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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 5

ELECTRIC POWER & LIGHT CORPORATION,

Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER ELECTRIC POWER & LIGHT CORPORATION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

ELECTRIC POWER & LIGHT CORPORATION, Petitioner, *against* SECURITIES AND EXCHANGE COMMISSION.	No. 7

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER ELECTRIC POWER & LIGHT CORPORATION.

Introduction.

This case is a companion case to *American Power and Light Company* v. *Securities and Exchange Commission*, No. 6. Both cases are the result of a single proceeding instituted by the Securities and Exchange Commission under Section 11(b)(2) of the Act, culminating in orders of dissolution which were upheld by the United States Circuit Court of Appeals for the First Circuit.

It is not the purpose of this petitioner, Electric Power and Light Corporation (hereinafter called "Electric"), to burden the Court with a repetition of argument already made in the American brief. The order of the Commission providing for the dissolution of Electric and that providing for the dissolution of American were entered on a single

opinion, on a consolidated record involving both petitioners, the grounds given by the opinion and orders of the Commission for the dissolution of each being the same. The Commission's orders were similarly treated in a single opinion by the Circuit Court of Appeals and both cases are now before this Court on a common record and have been consolidated for argument.

The arguments of American are, *mutatis mutandis*, applicable to Electric's case before this Court, and Electric urges those arguments on its own behalf. In principle the facts of each case are parallel for the purposes of review by this Court. If Section 11 of the Act is unconstitutional, or if Section 11 does not authorize the dissolution of holding companies in any situation, or if the action of the Commission in ordering the dissolution of American is void for any other reason, the action of the Commission in ordering the dissolution of Electric will also be void.

In this brief, however, Electric presents a separate argument upon which it believes that its case can and should be decided and which removes any necessity for going into issues of constitutional law, or of whether the Commission has power to dissolve corporations under Section 11 of the Act.

This separate argument on behalf of Electric falls into two parts. The first part is based upon the failure of the Commission to discharge its statutory duties under Section 11(a), Section 11(b)(1), and Section 11(e) of the Act. The second part of Electric's argument is directed to the errors of the Commission in dealing with Electric under Section 11(b)(2). The factual presentation of Electric's case will consequently be confined to the facts which bear upon these two arguments.

This is not to state that the arguments here made on behalf of Electric are not, *mutatis mutandis*, also applicable to American. It has been petitioners' effort rather to facilitate the decision of this Court with respect to both cases by refraining from duplicating complicated statements of fact and recitations of prior proceedings that raise precisely parallel legal problems. Only in briefly describing Electric itself and in discussing the particular errors of the Commission in dealing with the particular facts pertaining to Electric under Section 11(b)(2) will it be necessary to depart to some extent from that objective.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the First Circuit (R., Vol. IV, 869-899) is reported in 141 F. (2d) 606. The opinion of the Commission (R., Vol. II, 523-649) is reported in 11 SEC 1146.

Jurisdiction.

The decree of the United States Circuit Court of Appeals for the First Circuit was entered on March 17, 1944 (R., Vol. IV, 900) and Electric's petition for rehearing was denied by order of that court on April 18, 1944 (R., Vol. IV, 901).

The jurisdiction of this Court is invoked by petition for writ of certiorari to the United States Circuit Court of Appeals for the First Circuit under Section 240(a) of the Judicial Code (Act of February 13, 1925, 43 Stat. 938, U. S. C., Title 28, Section 347(a)), made applicable by Section 24(a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834-5, U. S. C., Title 15, Section 79x(a)). This Court granted Electric's petition for a writ of certiorari on May 28, 1945 (R., Vol. IV, 901).

Statute Involved.

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C., Section 79), copies of which are being submitted to the Court by American. Electric's argument revolves primarily around Section 11(a), Section 11(b)(1), Section 11(b)(2), and Section 11(e), which are set forth in Appendix A to this brief.

Questions Presented.

The questions presented in this brief are:

First: Whether the Commission can dissolve Electric under Section 11(b)(2) of the Act without any regard whatever to the purposes and requirements of Section 11(a), Section 11(b)(1), and Section 11(e); and

Second: Whether the findings of the Commission support the dissolution of Electric under Section 11(b)(2).

Statement.

Electric was organized in 1925 under the laws of the State of Maine and is a registered public utility holding company under the Act. Its subsidiaries include its southern electric system, consisting of Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company, and New Orleans Public Service, Inc.* (R., Vol. II, 545). Electric also has as subsidiaries United Gas Corporation and Dallas Railway & Terminal Company, and at the time of the issuance of the dissolution order it included among its subsidiaries Utah Power & Light

* This southern electric system is sometimes referred to in the industry as the ALMNO system, from the initials of the companies comprising it.

Company,* Idaho Power Company,† and Dallas Power & Light Company.‡

Electric, in addition to being a registered public utility holding company under the Act in its own right and in addition to being preponderantly owned by the public, is by statutory definition a subsidiary of Electric Bond and Share Company (herein called Bond and Share), and, as such, one of the five main sub-holding companies in the Bond and Share holding company system. It is to Bond and Share and to the Bond and Share system that this proceeding has been directed throughout.

The subsidaries of Electric have total assets carried at $772,751,730 (Appendix F-2 to SEC Opinion, R., Vol. II, 667) and the consolidated capitalization of Electric and its subsidiaries as of December 31, 1941, was as follows:

Long-Term Debt:	
Electric	$ 30,380,000
Subsidiaries	260,441,615
Preferred Stocks:	
Electric	84,575,467
Subsidiaries	117,405,300
Minority Interest#	2,534,194
Undeclared Cumulative Dividends on Preferred Stock of Subsidiaries held by Public	17,803,228
Common Stock: Electric	70,468,672
Earned Surplus	33,987,475
	$617,595,951

(R., Vol. II, 546-547).

* To be disposed of in the reorganization of Utah Power and Light Company now pending before the Commission. *Matter of Electric Power & Light Corporation and Utah Power & Light Company*, SEC Holding Company Act Release No. 5681 (March 24, 1945).

† Sold by Electric since the issuance of the dissolution order. *Matter of Idaho Power Company and Electric Power & Light Corporation*, SEC Holding Company Act Release No. 4458 (July 29, 1943); Same case, SEC Holding Company Act Release No. 4527 (August 31, 1943).

‡ To be sold pursuant to a proceeding now pending before the Commission. *Matter of American Power & Light Company and Electric Power & Light Corporation*, SEC Holding Company Act Release No. 6021 (August 31, 1945).

I.e., minority interest in common stocks of subsidiaries of Electric.

Electric owned from 61% to 95% of the voting power of its respective utility subsidiaries (R., Vol. II, 548). The aggregate par, stated or assigned value of all securities of its subsidiaries owned by Electric as of December 31, 1941, was $199,802,994 and their book value on the books of the issuers, including surplus and preferred dividend arrearages, was $256,415,384. Electric carried these securities in its investment account at $184,409,070 (R., Vol. II, 547).

At December 31, 1941, the subsidiaries of Electric had securities amounting to $339,188,243 outstanding in the hands of the public (Appendix F-2 to SEC Opinion, R., Vol. II, 667).

The capitalization of Electric itself at December 31, 1941, was as follows:

Type of Security	Amount Outstanding	Principal Amount or Stated Value
Gold Debentures, 5% Series, Due 2030	$30,380,000	$ 30,380,000
$7 Preferred Stock, Cumulative, No Par	515,135 shs.	
$6 Preferred Stock, Cumulative, No Par	255,430⅔ shs.	155,044,139
Second Preferred Stock, Series A, ($7) Cumulative, No Par	75,189 shs.	
Common Stock, No Par	3,453,189 shs.	
Earned Surplus		6,868,838
Total Capitalization and Surplus		$192,292,977
Unpaid Cumulative Dividends in Arrears June 30, 1942		$ 53,205,168

(R., Vol. II, 543-544).

The holdings of Bond and Share in voting securities of Electric, consisting principally of common stock, represent 46.8% of the total voting power of all the securities of Electric and have a stated or liquidating value of $17,558,108, or 9.14% of Electric's total capitalization, including debt securities and surplus (R., Vol. II, 544). The remaining securities are widely held by the public. There

are 24,000 stockholders of Electric (Tr., p. 5160), and thousands more have invested in its debentures.

This holding company, Electric, has been ordered dissolved by the Commission in a proceeding the issue of which was narrowly defined by the Commission on June 7, 1940, as:

> "* * * the *sole* issue of whether it is necessary to discontinue the existence of American Power & Light Company, *Electric Power & Light Corporation*, National Power & Light Company, and American & Foreign Power Company, Inc., or any of them, in order to ensure that the structure of the holding company system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among the security holders in that system"* (R., Vol. I, 64-5).

Any and all issues relating to Electric itself and any and all issues relating to any provision of the Act other than Section 11(b)(2) were thereby eliminated from the proceeding by the Commission itself. The issue was thus so framed as to make it appear either that nothing could be done with respect to the Bond and Share system pursuant to Section 11 or that Electric must be dissolved. No alternatives were to be considered.

Additional facts bearing upon Electric's argument will, in order to avoid a duplication, be set forth in connection with the relevant portions of the argument. The salient facts to be brought out here are:

First: That Electric owns an inter-connected southern electric system which it has sought to preserve as an "integrated public-utility system" (Section 2(a)(29) of the Act) throughout this proceeding; and

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* Emphasis in quotations added, unless otherwise noted.

Second: That the vast preponderance of the ownership of Electric is in the hands of the public, whose rights are clearly recognized and sought to be protected by the Act; and

Third: That Electric has been ordered to dissolve, not for any sins of its own and certainly not for any sins committed by it as the representative of its more than 24,000 public security holders, but solely because of its alleged effect upon the structure of and the distribution of voting power in the Bond and Share system.

Specification of Errors.

Electric relies on and urges all the errors assigned in its petition for a writ of certiorari (pp. 4-6). However, only those matters set forth in the Questions Presented will be argued in this brief on behalf of Electric, for the reasons set forth above in the Introduction.

SUMMARY OF ARGUMENT

A.

Section 11 of the Act contemplates (1) that existing holding company systems shall be geographically integrated and (2) that existing holding company systems shall not remain unduly or unnecessarily complicated in structure nor retain unfair or inequitable distribution of voting power. The Act imposes upon the Commission the duty of examining *each* and *every* registered holding company and of bringing them into accord with *both* statutory objectives, so far as is possible. The action of the Commission in ordering the dissolution of Electric, even assuming the Commission's factual assertions to be correct, deviates from this statutory duty in the following particulars:

(1) Up to the third degree, holding companies and holding company systems are entitled to live, so far as is possible. Section 2(a)(9) defines a holding company system as *any* holding company, together with its subsidiaries. Electric's statutory rights as the parent company of a holding company system and the Commission's statutory duties with respect thereto are the same as in the case of the Bond and Share system.

The present proceeding ignored the Electric system from start to finish. The rights of the Electric system under Section 11, and the Commission's duties with respect thereto, cannot be disposed of in the absence of a hearing and findings directed to the Electric system.

(2) Neither the Notice of and Order for Hearing in this proceeding under Section 11(b)(2), nor the Findings and Opinion herein reflect any determination by the Commission of the extent to which the corporate structure of Electric may be simplified or of the extent to which the system of either Electric or of Bond and Share may be integrated. The Commission is entirely derelict in the performance of its duties under Sections 11(a), 11(b)(1) and 11(e) and under Section 11(b)(2) with respect to Electric.

(3) Simplification pursuant to Section 11(b)(2) may proceed independently of integration under Section 11(b)(1). *Cf. Commonwealth & Southern Corporation* v. *Securities and Exchange Commission,* 134 F. (2d) 747 (C. C. A. 3rd, 1943.) But simplification cannot proceed inconsistently and in conflict with the requirements of Section 11(b)(1). Simplification to the point of dissolving the head company of a great regional system runs afoul of the coordinate statutory requirement of integration under Section 11(b)(1).

Wiping out the five major subsidiaries of Bond and Share has clearly no relation to the integration require-

ments of Section 11(b)(1). Bond and Share will either be left with statutory "control" of an impossibly unintegrated scattering of utility properties, or neither such "control" nor the possibility of integration of existing holding company systems will exist. On the other hand, in view of the fact that Section 11 contemplates that integration shall be accomplished as far as possible through the medium of existing holding company systems, Electric and its southern system stand squarely within the purview of Section 11.

This is not to urge that Section 11(b)(1) proceedings must precede proceedings under Section 11(b)(2), or that Section 11(b)(2) proceedings may not be had independently of integration. Electric's argument is limited to the fact that Electric itself is the only visible means of integrating its southern system as required by the statute, and consequently cannot be dissolved in the name of simplification without a finding by the Commission that Electric is not a proper vehicle for such integration. The full purpose of Section 11 cannot be fulfilled by a "simplification" which makes integration impossible. The Commission must either utilize other means of simplifying Bond and Share with a view to accomplishing the integration of Electric, or it must find that Electric is not a proper subject for integration. As the Commission has done neither, its order dissolving Electric must fall.

(4) Section 11(e) accords Electric the privilege of filing a plan for bringing itself into conformity with Section 11(b) and gives Electric the *right* to a hearing on that plan. Electric filed a plan pursuant to this section in a bona fide attempt to bring it and its system within the spirit and provisions of Section 11 of the Act, contemplating both the simplification and the integration of its system. The Commission has not given Electric its statutory hearing with respect to this plan but has proceeded instead with the

alleged simplification of the Bond and Share system without any regard whatever to the rights of Electric.

B.

The findings of the Commission in this proceeding cannot support the action of the Commission in ordering the dissolution of Electric under Section 11(b)(2).

Stripped of verbiage and irrelevant corporate statistics, the so-called "Findings" and Opinion of the Commission show on their face that the sole ground for the dissolution of Electric is the claim that it is a "pyramiding device" in the Bond and Share system. The order is obviously not based upon the effect of complexity or unfair distribution of voting power on the Electric system. The order is based solely on the charge that complexity and unfair distribution of voting power result from the "pyramid" of the operating utilities owned by Electric which in turn is "controlled" by Bond and Share within the meaning of the Act.

Substantially all holding company systems subject to the Act are "pyramids" within the rationale of the Commission. Yet the only case in which Congress proscribed holding company systems *for that reason alone* is the case of third-degree holding companies. Even in that case, the remedy is not dissolution but the requirement that the offending holding company "shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company." (Section 11(b)(2)).

The mere fact that Electric is an intermediate holding company is insufficient by itself to justify the dissolution of Electric. No other findings of the Commission support its order. In fact the so-called "Findings" of the Commission consist for the most part of assumptions and guesses, which we shall demonstrate to be glaringly erroneous. The dissolution order must consequently fall.

ARGUMENT

POINT I

THE COMMISSION CANNOT PROCEED TO DISSOLVE ELECTRIC UNDER SECTION 11(b)(2) IN COMPLETE DISREGARD OF THE COORDINATE REQUIREMENTS OF SECTION 11(a), SECTION 11(b)(1) AND SECTION 11(e).

To hold that the broad powers granted to the Commission by Section 11 of the Act are valid, and include the power to dissolve holding companies subject to the Act in appropriate cases, does not dispose of Electric's case. It must still be determined whether the dissolution of Electric squares with the standards and purposes of the Act as a whole. Whatever the power granted to the Commission, that power was not granted as an end in itself, but as a means of accomplishing the duties enjoined upon the Commission by Congress.

Virtually all the provisions of the Act other than Section 11 deal with future events, and are concerned with the registration and regulation of public utility holding companies in order to prevent a repetition of the abuses disclosed by various investigations, beginning as far back as 1928, and enumerated in Section 1 of the Act. Section 11, on the other hand, imposes upon the Commission the task of integrating existing holding companies and simplifying their corporate structures in order to bring existing systems within regulable compass.

Section 11(a) provides:

> "It shall be the duty of the Commission to examine the corporate structure of *every* registered holding company and subsidiary company thereof, the relationships among the companies in the holding-

company system of *every* such company and the character of the interests thereof and the properties owned or controlled thereby *to determine the extent to which* the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system."

The statute enjoins upon the Commission the *duty*, as soon as practicable after January 1, 1938, to require that:

> "*each* registered holding company, and *each* subsidiary company thereof, shall take such action as the Commission shall find necessary *to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system*, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system * * *" (Section 11(b)(1)).

That statute also requires that, as soon as practicable after January 1, 1938:

> "*each* registered holding company, and *each* subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. * * *" (Section 11(b)(2)).

Chairman James M. Landis on September 28, 1935, summarized the purport of these Sections of the Act as follows:

> "The Act represents a solemn judgment by the Congress that the holding company as a financial and an operating device tends to be destructive of the better values in our civilization, *if the system is permitted to expand beyond the natural boundaries established by economic and geographic limitations.* These boundaries Congress has not specifically defined, nor could it do so, but it has left to our Commission this standard to be applied in the light of continuing and concrete study. *Furthermore, it has given us two years, at the end of which we are to have a plan, to bring about this economic and geographic integration together with the simplification of the complicated financial set-ups* that in so many cases obscure the right of holders of stocks and bonds." (SEC Holding Company Act Release No. 3.)

An examination of the three quotations set forth above from Sections 11(a) and 11(b) of the Act makes it clear that, if the Commission under Section 11 has the vast power of corporate life and death which it claims and which we are assuming *arguendo* that it has, the duties of of the Commission under Section 11 are commensurate with those vast powers. The Commission must make a responsible determination with respect to the extent to which *each* public utility holding company system may be integrated and its corporate structure simplified in order that it shall conform to the Act. The only short-cut to the attainment of the statutory objective is the flat prohibition in Section 11(b)(2) against holding companies of the third degree.

The dual objectives of integration (Section 11(b)(1)) and simplification (Section 11(b)(2)) are of equal importance, and to a large extent interrelated.

As stated by the Commission itself:

> "The two classes of proceedings are interrelated, in that action taken to comply with the geographical standards may also be a step toward achieving corporate simplification, and steps taken in the direction of corporate simplification may serve to eliminate substantial problems which would otherwise require determination in proceedings under Section 11(b)(1)" (*Seventh Annual Report of the S. E. C.*, Fiscal Year Ended June 30, 1941, p. 73).

Indeed, the Commission has expressly recognized the interrelation of geographical integration and corporate simplification with respect to this very proceeding (*infra*, p. 21).

The Impact of Section 11 upon Bond and Share and upon Electric

The Bond and Share system is described by the Commission as "a pyramid-like structure of which Bond and Share itself constitutes the apex, 5 subholding companies create an intermediate tier, and approximately 237 direct and indirect subsidiaries of the latter form the base." (R., Vol. II, 535).

Electric is one of the five major holding subholding companies in the Bond and Share system, each of which is in turn itself the parent company of a holding company system. As of December 31, 1941, the utility subsidiaries of Electric served with electricity approximately 104 communities having a population of 2,500 or over, and served some 98 such communities with gas. These communities, located in Arkansas, Colorado, Idaho, Louisiana, Mississippi, Nevada, Oregon, Texas, Utah, Wyoming and Mexico had a total population of approximately 2,808,244 (R., Vol. II, 548).

Electric is the holding company of one of the most important regional holding company systems in the United

States. Electric's southern system of electrical properties consists of a group of inter-connected electric utilities grid-ironing a large part of Arkansas, Louisiana and western Mississippi.

It is apparent that the application of Section 11 to Electric calls for the fullest discharge of the Commission's statutory functions. The Section was enacted to deal with just such a ramified collection of holding company systems as that of Bond and Share and with just such a holding company system as that of Electric.

Electric's Rights as a Holding Company System are Recognized by the Statute and Must be Recognized by the Commission

The fallacy of the present proceeding lies in the failure of the Commission to recognize any rights on the part of Electric to continue to exist as the parent company of a holding company system owning its own integrated operating properties, to recognize any rights on the part of the public security holders of Electric, or to recognize the duties of the Commission with respect to Electric's system as such.

Section 2(a)(9) defines a holding company system as *any* holding company, together with its subsidiaries. Up to the third degree, *all* holding companies and holding company systems are entitled to live in so far as they can be geographically integrated and in so far as their corporate structure can be simplified in accordance with Section 11. Electric's statutory rights as the parent company of a holding company system are precisely the same as those of Bond and Share. Yet the instant proceeding wholly disregards the Electric system, and, indeed, destroys it without a hearing.

It is perhaps for this reason that the Findings and Opinion attempt to attribute no functions or even separate

identity to Electric, in the hope that the Commission will thereby obscure the fact that it has side-stepped its statutory duties with respect to the Electric system.

According to the Commission itself, the securities of Electric owned by Bond and Share represent less than 10% of Electric's capitalization (R., Vol. II, 544). The remaining 90%, or roughly $175,000,000 out of a total capitalization of approximately $192,000,000, is represented by securities held by the public.

There are at present 24,000 stockholders of Electric (Tr., p. 5160) and thousands more have invested in its debentures. When a utility system of such magnitude, so preponderantly owned by the public, is affected by a statute the purpose of which is stated in its text no less than 68 times as the protection of the "public interest" and of "investors or consumers," it is preposterous to contend that such a system has no independent standing under the Act.

Disparaging the functions of Electric and pointing out that Bond and Share's statutory control enabled it to elect the board and officers of Electric, which take the Commission many pages to discuss, are both beside the point. Section 11 was not enacted to mete out rewards and punishments for past performance. Given perfect past performance, there would have been no Act. The statute assumes that the growth of holding companies in the past has left something to be desired, and has specified the remedy: integration and simplification of *existing* holding company systems, of which Electric is one.

The Commission has not Discharged the Duties Enjoined upon it by the Act

Section 11 contains detailed directions defining the responsibilities of the Commission, together with a time schedule.

The statute was enacted in 1935. Section 11(a) provides that it shall be the duty of the Commission to examine the corporate structure of *every* registered holding company and subsidiary company thereof to determine the *extent to which* the corporate structure of its holding company system and the companies therein may be simplified and geographically integrated. As stated by Chairman Landis (*supra*, p. 14), this section contemplates that within two years the Commission shall have a plan to bring about economic and geographic integration of holding company systems together with corporate simplification.

Section 11(b) provides that as soon as practicable after January 1, 1938, roughly two years after the statute became effective, the Commission, after notice and opportunity for hearing, shall proceed to bring about this economic and geographic integration and the corporate simplification of existing holding company systems, presumably in accordance with some purpose arrived at under Section 11(a).

While Section 11(e) permits any registered holding company or subsidiary thereof to submit a plan for compliance with Section 11(b) at *any* time after January 1, 1936, the great majority of companies refrained from taking any action under the statute until its constitutionality was decided by this Court on March 28, 1938, in *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419. In that case, however, while the Court upheld the registration provisions of the Act, it did not pass upon the constitutionality of Section 11.

Thereafter, in response to a letter from the Chairman of the Commission, dated August 3, 1938, Electric filed a preliminary statement relating to the integration of its system under Section 11(b) in November of 1938. The Commission's views on Section 11(b) as of that time are summarized in its Fifth Annual Report for the fiscal year ended June 30, 1939:

"Section 11(b) of the Public Utility Holding Company Act of 1935 imposes upon the Commission certain duties with regard to the integration and corporate simplification of public utility holding company systems. The Commission is directed to require every registered holding company to take such action as the Commission shall find necessary to limit the operations of its system to those of a single integrated public utility system and to such other businesses as are reasonably, incidentally, or economically necessary or appropriate to the operation thereof. However, the Commission must permit one holding company to control more than one integrated system if it shall be proved that each such additional system cannot be operated independently without the loss of substantial economies, that all of such additional systems are located in one State or in adjoining States or in a contiguous foreign country, and that the continued combination of such systems under the control of the one holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

"The Commission must also cause the companies under its jurisdiction to bring about a simplification of holding company structures so as to eliminate unnecessary complications or unfair distributions of voting power. This must include elimination of holding companies beyond the second degree.

"Instead of waiting for the Commission to bring action, registered holding companies or subsidiaries may invoke the aid of the Commission in carrying out voluntary reorganizations designed to satisfy the integration and corporate simplification requirements. If, after hearing, the Commission finds such a plan necessary to effectuate the provisions of Section 11(b), and fair and equitable to the persons affected by the plan, the Commission is directed to issue an order approving the plan.

"On August 3, 1938, William O. Douglas, former Chairman of the Commission, addressed a letter to the chief executives of all registered holding companies, requesting them to inform the Commission as to their tentative plans for compliance with Section 11(b). Since publication of such tentative plans might be misleading, the Commission stated that they would be treated as informal and confidential. The purpose of this request was to focus the attention of the industry upon the steps needed to comply with the statute, and to assist the Commission in determining the best procedure to secure such compliance, as well as to obtain both data and ideas that might prove helpful to the Commission. With few exceptions, the registered holding companies submitted more or less elaborate statements in response to this request. These have been carefully studied and analyzed, and have aided considerably in the formulation of working plans for securing compliance with the statute. The *next step* is the specific and separate determination of each company's problem, a matter which in each case must be based on the evidence produced, both by the Commission and the company, at a public hearing." (pp. 69-70).

No such step was ever taken with respect to Electric.

On February 28, 1940, the Commission instituted integration proceedings against Bond and Share, Electric and the other sub-holding companies by Notice of and Order for Hearing pursuant to Section 11(b)(1) (Holding Company Act Release No. 1944). This notice identified and specified the location of the companies in the Bond and Share system, concluded that the system was not integrated, and requested each company (including Electric) to explain its position with respect to the proceeding. Further, each company was to state what action should be taken in order that the operations of *each registered holding company* system (including

Electric's) be limited to a single integrated public utility system pursuant to Section 11(b)(1). After some preliminary motions, not here material, no further steps were taken and no hearings were held in that proceeding.

The present proceeding was instituted on May 9, 1940, by Notice of and Order for Hearing pursuant to Section 11(b)(2). (R., Vol. I, 27). The interrelation of the two proceedings was thus stated by the Commission:

> "The Commission instituted Section 11(b)(1) proceedings directed against the Electric Bond and Share system on February 28, 1940. The subsequent Section 11(b)(2), or corporate simplification proceedings, indicated that progress in eliminating the innumerable corporate complexities of the system would facilitate securing compliance with the integration requirements of the Act. As a consequence, the integration proceeding has been held somewhat in abeyance pending progress in the corporate simplification proceedings." (*Seventh Annual Report of the S. E. C.*, Fiscal Year Ended June 30, 1941, p. 78.)

When it appeared, however, from the course of this proceeding, that the Commission was concerned solely with corporate simplification and only with the Bond and Share system, Electric formulated a plan for the integration and simplification of its system, which was filed with the Commission on December 4, 1941, pursuant to Section 11(e). (R., Vol. II, 479). As this plan covered the full subject matter of Section 11(b), Electric made a formal motion to consolidate its application for approval of its plan with the pending proceedings. (R., Vol. II, 473). This motion was denied, but not until eight and one-half months after it was made, in the following language:

> "It appears that if consolidation were granted, the result would be to inject into the present proceeding

> issues of fact and law in many respects different from, and unrelated to, those here involved. In consequence, no useful purpose would be served by permitting the consolidation of the 11(e) Plans with the present proceeding, but on the contrary, delay and confusion would inevitably result. Accordingly, the motion for consolidation will be denied." (R., Vol. II, p. 533).

The interrelation of integration and simplification of existing holding company systems was thus squarely rejected by the Commission in clear violation of the full mandate of Section 11.

The order dissolving Electric was entered on August 22, 1942 (R., Vol. II, 652), nearly seven years after the enactment of the Public Utility Holding Company Act of 1935. The Commission has had nearly seven years in which to formulate its plan, required by Section 11(a), for the geographical integration of public utility holding company systems, of which Bond and Share and Electric are among the most important. The sporadic and halting manner in which the Commission has proceeded with respect to the system of Bond and Share and the system of Electric and the other sub-holding company systems, culminating in the dissolution of Electric and other sub-holding companies, amply shows that the Commission has not complied with the Congressional mandate and has not performed the duties enjoined upon it by Section 11.

The integration provided for in Section 11 was not to be accomplished by the physical removal of operating properties from one place to another, but by the reordering of corporate relationships of existing holding company systems pursuant to some over-all plan arrived at under Section 11(a). There is a point at which integration and simplification are inextricably intertwined. The Commission itself has clearly recognized this fact. Yet the record in

this proceeding is barren of any determination by the Commission of the extent to which either Electric or Bond and Share may be integrated, or, for that matter, of the extent to which the corporate structure of Electric may be simplified.

The Commission may not pursue one purpose of Section 11(b) to the exclusion of the other; it may not pursue simplification in such a manner as to make integration impossible.

Electric Cannot be Dissolved in the Absence of a Finding that it is not a Proper Vehicle for the Integration of Its Southern System

Electric does not urge either that Section 11(b)(1) proceedings must precede proceedings under Section 11(b(2) or that Section 11(b)(2) proceedings may not be had independently of integration. Simplification pursuant to Section 11(b)(2) may proceed independently of integration under Section 11(b)(1). *Cf. Commonwealth & Southern Corporation* v. *Securities and Exchange Commission,* 134 F. (2d) 747 (C. C. A. 3rd, 1943). But simplification cannot proceed inconsistently with and in contravention of Section 11(b)(1). Electric is the only visible means of integrating a great regional system as required by the statute. Simplification to the point of dissolving Electric cannot be supported without a finding by the Commission that Electric is not a proper vehicle for such integration. No such finding has been made.

Simplification and integration of existing holding company systems are coordinate objectives of the Act. The dissolution of the five major sub-holding companies of Bond and Share cannot be said to contribute to the objective of integration. Bond and Share will either be left with statutory "control" of an impossibly unintegrated scattering of utility properties, or, in so far as control is lacking, integration will be out of the question. Therefore, the dis-

solution of Electric is in clear derogation of the purposes of Section 11(b)(1).

Whatever may be said as to the status of its other properties under Section 11(b)(1), Electric has an interconnected southern electric system in Arkansas, Louisiana and Mississippi—a system which may be said to be at least *prima facie* an "integrated public-utility system" within the meaning of Section 2(a)(29). The Federal Trade Commission, predecessor of the Securities and Exchange Commission in the administration of the various securities statutes and the investigatory body which laid a large part of the factual foundation on which the Act was passed, described Electric's southern system, as follows:

> "Gridironing a large part of Arkansas, northeastern Louisiana, and western Mississippi is a group of connected electric utilities owned by Arkansas Power & Light Co., Mississippi Power & Light Co., and Louisiana Power & Light Co. and a subsidiary" (Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 89).

This southern system was planned as a system and exists today as a system. A map showing the properties embraced within the system is set forth in the back of this brief as Appendix C.*

Originally planned by prior owners as a somewhat smaller system in eastern Arkansas, northern Louisiana and western Mississippi, the territory covered by the southern system formerly contained hundreds of small isolated and inefficient power plants. Today integration has been largely accomplished, with the result that the territory is now served mainly by eight principal plants, with 28 addi-

* The red lines on this map (Respondent's Exhibit 299 in the proceeding) show the electric system as of January 1, 1940. The map is substantially correct as of today, with the exception that the Dallas properties are not now proposed to be included in the system.

tional smaller plants used chiefly for standby, emergency and peak-load purposes. The principal plants are of a modern design and a degree of efficiency in operation undreamed of in the pre-holding company days.

As shown by the map above referred to, the integration which began under such prior owners and which since 1925 has been carried on and enlarged by Electric has resulted in the development of a coordinated unit for the generation and distribution of electricity throughout the entire region. The separate corporations which form parts of this unit are in each case dependent upon some phase of the system outside of their own corporate properties in order to render the service which they are now able to render. Steam plants of one company are brought into balance with hydro plants of another. To destroy the system would be to destroy the full effectiveness of its component parts (Tr., pp. 3037-3058, 3281-3283).

The fact that the utility properties in Electric's southern system have been integrated under Electric's control has resulted in vast improvements to consumers and to investors and has contributed largely to the development of the region where the system is located. Technical, engineering and managerial direction has been given to the southern system companies by the holding-company system of which Electric is a part, and Electric is prepared to show that in the future it will be able to make available to this system all the advantages of centralized technical, engineering and managerial direction.

That some of these advantages have in the past been attributable to the system of which Electric is a part, rather than to Electric standing alone, is irrelevant. The questions before the Commission under Section 11 relate rather to the useful functions which Electric as a regulated

holding company could perform for its integrated system in the future.*

The Act was intended as a statute of constructive regulation, not as a purely punitive measure. Destruction of existing companies, if an end at all, is certainly not an end in itself. A study of the structure and purposes of the Act shows that regulation was proposed to be facilitated by integrating the holding company properties into geographical systems, as well as by simplifying their corporate structures.

Section 1(b)(4) of the Act says that the interests of the public, investors and consumers are or may be adversely affected when the growth of holding companies bears no relation to "integration and coordination of related operating properties." Section 2(a)(29) defines the term "integrated public-utility system" with such emphasis on the advantages of integration as to negative any intent to jettison such advantages. Section 10(c)(2) mentions integration among the tests to be applied by the Commission in passing on an application for acquisition of utility securities or assets. And the command of Section 11(b)(1) of the Act is: "It shall be the *duty* of the Commission, as soon as practicable after January 1, 1938: (1) to require by order, after notice and opportunity for hearing, that *each* registered holding company," of which Electric is one, shall take such steps as the Commission shall find necessary to limit the operations of the holding-company system to an integrated public utility system or systems.

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* The most extended study of public utility holding companies is that of the Federal Trade Commission, made pursuant to Sen. Res. 83 (70th Cong., 1st Sess.), which is cited in Section 1(b) of the Act. For the convenience of the Court, excerpts from the Federal Trade Commission reports, showing the recognized social and economic advantages of public utility holding companies, are annexed to this brief as Appendix B.

The status of Electric and its southern system under Section 11(b)(1) is, therefore, clear, as is the duty of the Commission with respect thereto.

Electric Has a Statutory Right to a Hearing on Its Plan

Moreover, Section 11(e) of the Act gives Electric the clear privilege to present a plan for bringing itself into conformity with the requirements of Section 11(b) and the right to a hearing on such a plan. The provisions of Section 11(e) so far as material are:

> "* * * any registered holding company or any subsidiary company of a registered holding company *may*, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, *after notice and opportunity for hearing*, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission *shall* make an order approving such plan * * *."

The requirements of this section also bring into sharp focus the error of the Commission in assuming that it need not deal with Electric and Electric's system but need only deal with Bond and Share and its system. Section 11(e) says that "any registered holding company [of which Electric is one] or any subsidiary company of a registered holding company [of which Electric is one] may * * * submit a plan to the Commission" for the taking of action "for

the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of Subsection (b)." As stated in *Commonwealth & Southern Corporation* v. *Securities and Exchange Commission*, 134 F. (2d) 747 (C. C. A. 3rd, 1943), in discussing the rights of holding companies under Section 11(e):

> "It will thus be seen that the congressional purpose is to leave open to the holding companies a broad area of discretion in determining just how they are to bring their systems into compliance with the required standards" (p. 751).

It follows, therefore, that Electric had a clear right to present a plan and that it had a clear right to a hearing on the plan which it presented. It is submitted that in order to render these statutory rights of any real value, Electric was also entitled to such hearing on its plan in advance of being ordered to dissolve.

The Disposition of Electric's Plan for Simplification and for the Integration of Its Southern System by the Commission and by the Circuit Court of Appeals

As noted above, the effort on the part of Electric to exercise its rights under Section 11(e), and to bring integration problems into the present proceeding by consolidating the present proceeding with Electric's application for approval of its plan under Section 11(e), was rejected by the Commission.

The Commission's discussion of Electric's plan was entirely concerned with its 11(b)(2) aspects, and the plan was said to be inadequate, without a hearing thereon, primarily because it did not provide for the divorcement by Electric of Bond and Share's control of Electric. Such action by Electric itself is, of course, impossible. The di-

vorcement of Bond and Share's control can be effectuated only by order of the Commission or by voluntary action on the part of Bond and Share. The very wording of the Act shows that there was no intent to foist upon Electric the impossible burden of attempting to sever the Bond and Share control; Section 11(e) permits a company to submit a plan "for the purpose of enabling such company or any *subsidiary* company thereof"—not a parent company thereof—to comply with the provisions of Section 11(b).

The part of Electric's plan which provided for integration was, in effect, not considered at all by the Commission. Only in connection with the reiteration of the argument that Electric should be dissolved under Section 11(b)(2) because of lack of "function" did the Commission advert to integration; and it did so in the following way:

> "There is nothing about the sub-holding companies which makes them vehicles for holding together a single integrated system in any respect superior to any other corporate entity, and in fact *it would seem* that a company specially formed for this purpose, with appropriate domicile and a charter and by-laws free from the complexities found in those of American and Electric, would be far preferable. More important *it is not at all certain* on the present record that either American or Electric possesses any 'single integrated system' which requires a holding company to hold it together. *Without making any judgment on these points at this time*, it may be stated that *our uncertainty* arises from two causes: first, *it is an open question* whether American and Electric will be able to sustain their claims as to their alleged 'integrated systems', or as to their right to retain alleged additional systems under the standards of Section 11(b)(1); secondly, in the light of data in the record concerning write-ups in the property accounts, depreciation policies, and earnings histories of the sys-

tem companies, *there likewise exist substantial questions* as to the equity of American and Electric in many of the subsidiaries which they claim as important parts of their systems; *if it should later be determined* that little or no equity exists in certain such companies, they of course would not be retainable apart from the standards of Section 11(b)(1)" (R., Vol. II, pp. 645-6).

Thus, the whole matter of integrating the existing public utility holding company system of Electric is light heartedly dismissed by the Commission in terms of pure conjecture. There is no responsible determination that Electric either is or is not an appropriate vehicle for the integration of its southern system pursuant to the mandate of Section 11(b)(1). Nor was there any hearing on the matter.

The Circuit Court of Appeals followed the Commission's lead, in the following language:

> "The Commission considered the suggestion that petitioners might be left in existence to perform the function of holding together integrated public utility systems as contemplated by §11(b)(1), and observed: 'There is nothing about the subholding companies which makes them vehicles for holding together a single integrated system in any respect superior to any other corporate entity, and in fact it would seem that a company specially formed for this purpose, with appropriate domicile and a charter and by-laws free from the complexities found in those of American and Electric, would be far preferable.' As we understand the orders under review, it is open to each of the petitioners, in submitting plans for effectuation of the orders, to propose a reorganization along these lines looking toward the creation of a new holding company" (R., Vol. IV, pp. 890-1).

It is respectfully submitted that Congress did not intend the statutory objective of integrated public utility holding

company systems to be disposed of in this summary and ill-considered manner. The Commission cannot evade its functions under Section 11(b)(1) by disparaging plans submitted under Section 11(e), upon which hearings have not been held. Nor can the Circuit Court of Appeals dispose of Electric's rights under Section 11(b)(1) by speculating that Electric might be permitted by the Commission to reorganize and, as reorganized, to retain its southern system.

The Divorcement of Electric from Bond and Share

While it is not for the Circuit Court of Appeals or for this Court to determine on this appeal what specific action the Commission should take with respect to the Electric system pursuant to Section 11, it is still the function of judicial review to see to it that the Commission observes those rights accorded by Congress in specifying the standards to be applied under the Act. The Commission may have latitude for discretion in its choice of a remedy for a particular situation, but that discretion must be exercised within the orbit of the Congressional purpose.

It is perfectly clear that the objections of the Commission to the effect of the continued existence of Electric in the Bond and Share system can readily be remedied by severing the Bond and Share control. If the Commission does not believe that an integrated and simplified Electric system can remain in the Bond and Share system without complicating the structure of the Bond and Share system or unfairly distributing its voting power, then severance of the Bond and Share control is the only remedy consonant with the requirements of integration.

The Circuit Court of Appeals recognized the plausibleness of this procedure, but refused to enjoin it upon the Commission because:

> "The present litigation is but part of a larger proceeding instituted by the Commission to deal in accordance with the statutory mandates with the whole Electric Bond & Share system and all of its component parts. We are not in a position now to size up the whole broad situation, nor do we know what the Commission may have in mind to do with the many Bond & Share problems which will remain after the present cases, dealing with two of Bond & Share's subholding companies, are disposed of." (R., Vol. IV, 889).

It is true that the Commission's task with respect to Electric is a part of its broader task of integrating and simplifying the corporate structure of the entire public utility industry in a coherent manner, all the aspects of which cannot be before the courts in a single proceeding. The argument does not, however, justify dealing with Electric contrary to the statutory mandate or in a manner not supported by the record.

The error of the Commission in this case lies in rigidly confining its attention to Bond and Share, disregarding Electric, and thus disposing of Electric in such a way as to frustrate the purposes of Section 11(b)(1). There is nothing in the statute requiring the Commission to think only in terms of top holding companies. Indeed the requirements of the statute are, in some situations, quite to the contrary, as the Commission itself recognizes. *In the Matter of The United Light and Power Company, et al.*, 9 SEC 833 (1941) is an apt illustration. There the Commission decided that Section 11(b)(1) required it to proceed, not from the top down, but from the bottom up:

"Under Section 2(a)(9) of the Act, a holding company system is defined to include 'any holding company, together with all its subsidiary companies.' Under this definition it is evident that the holding company system of the top holding company (The United Light and Power Company) comprehends all of its subsidiaries, direct and indirect; in other words, it includes all of the companies which are respondents in either of the pending proceedings. Each of the other registered holding companies which is a respondent, however, may similarly be said to have a holding company system of its own, which includes the holding company in question together with its own subsidiaries. * * *

"In considering what action should be ordered to be taken by the respondents pursuant to Section 11(b)(1) of the Act, therefore, we will consider in turn the application of the standards of the Act to the holding company system of each registered holding company which is a respondent. For this purpose, it is appropriate to commence at the bottom of the pyramid and to conclude with the holding company system of The United Light and Power Company, which as indicated comprehends within it all of the holding company systems of the various subholding companies." (pp. 838-9).

Electric cannot, of course, ask this Court to order the Commission to follow a particular course or to select the remedy of divorcing Bond and Share's control of Electric. Its purpose here is to point out that the Commission has available remedies consonant with the full intent of Section 11. In such a situation, and in the absence of a finding that Electric is not a suitable means for integrating its southern system, it is submitted that the order of dissolution cannot stand. In the exercise of its discretion the Commission must choose a remedy that will forward, not make impossible, the purposes of the Act.

POINT II

THE FINDINGS OF THE COMMISSION IN THIS PROCEEDING CANNOT SUPPORT THE DISSOLUTION OF ELECTRIC UNDER SECTION 11(b)(2).

The Notice of and Order for Hearing, dated May 9, 1940, initiating this proceeding under Section 11(b)(2) stated that the purpose of the proceeding was, among other things, to determine:

> "whether it is necessary to discontinue the existence of, or modify the corporate structure of, or redistribute the voting power among security holders of, said Electric Bond and Share Company or any of the other respondents herein; * * *"

and:

> "what further action, if any, is necessary and shall be required to be taken by the respondents herein, or any of them, to ensure that the corporate structure or continued existence of any of the respondents herein does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of the holding company system of Electric Bond and Share Company; * * *" (R., Vol. I, 50).

By order of the Commission dated June 7, 1940, the purpose of the proceeding was subsequently confined:

> "to the issue of whether it is necessary to discontinue the existence of American Power & Light Company, *Electric Power & Light Corporation*, National Power & Light Company, and American Foreign Power Company, Inc., or any of them, in order to ensure that the structure of the holding company system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated and

that voting power shall not be unfairly or inequitably distributed among the security holders in that system'' (R., Vol. I, 66).

Whatever might have been accomplished by the Commission consonant with the requirements of Section 11 under its original Order, this limitation of issues effectively precluded consideration of the impact of Section 11 upon the Electric system as such. With the case thus framed, the Commission was committed to the view that the focal point of attack upon a two-layer holding company system must be the intermediate holding company, and that if complicated structure or wrongful distribution of voting power is found, the dissolution of the intermediate holding company is automatically and without more the sole appropriate remedy.

The Fact that Electric is an Intermediate Holding Company in the Bond and Share System is not Ground for Dissolution under Section 11(b)(2)

The basic facts relied upon by the Commission may be simply summarized. The percentage of the total voting power of the securities of its public utility subsidiaries owned by Electric ranged from 95.4% in the case of Louisiana Power & Light Company to 61.6% in the case of United Gas Corporation. The percentage of the capitalization of the subsidiaries represented by the securities owned by Electric is averaged by the Commission at 39.21%. This percentage is then reduced by various ''adjustments'' from 39.21% to 32.72%, and finally to 15.65% (R., Vol. II, 622-3).

The percentage of the total voting power of the securities of Electric owned by Bond and Share is stated as

46.8%, which is said to represent 9.14% of Electric's capitalization. The result is said to be that Bond and Share "is vested with control of the Bond and Share-Electric system through ownership of common and preferred stock of Electric equal to 9.14% of Electric's capitalization, which represent an interest of only 8.72% in the total capitalization of Electric's subsidiaries *before* adjustment for write-ups and depreciation and depletion" (R., Vol. II, 624).*

The Commission concludes:

> "On the basis of the foregoing figures, it is apparent we must find that voting power is unfairly and inequitably distributed among the security holders of the Electric system and among the security holders of the Electric-Bond and Share system; and accordingly that the continued existence and capital structure of Electric unfairly and inequitably distribute voting power among security holders of the Bond and Share system" (*ibid*).

Turning to complexity, the Commission again bases its case on "pyramiding" alone. Thus, in addressing itself to the stated issue, the Commission says:

> "Not only are the continued existence and corporate structure of American and Electric offensive to the voting power distribution standards of Section 11(b)(2), but we find that these companies also contribute in substantial measure to the undue and unnecessary complexity which exists in the Bond and Share system in contravention of that section. *It is evident that both results follow from the basic circumstance that these companies constitute pyramiding devices, and that such results are in effect reverse sides of the same coin.*" (R., Vol. II, 624-5).

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* Italics in original.

The order of dissolution cannot be properly based upon complexity or unfair distribution of voting power within the Electric system and the effect thereof upon such system. Neither complexity nor unfair distribution of voting power within the Electric system was within the issues of this proceeding nor could either be responsibly remedied by killing the patient. The mass of corporate statistics and the Commission's arguments with respect thereto lead to the single conclusion that complexity and unfair distribution of voting power both result from the "pyramid" created by the existence of Electric as an intermediate holding company in the Bond and Share system.

This is further brought out in the Commission's discussion of steps voluntarily taken to bring Bond and Share and the major sub-holding companies into closer conformity with the Act. Thus, in disposing of certain organizational changes made as early as 1935, the Commission discloses its preoccupation with "pyramiding" to the exclusion of all else:

> "• • • *we doubt that even changes of the most drastic character in the structures of the Bond and Share system and the subholding companies could have saved the latter from the impact of Section 11(b)(2)*, because, as we stated in our National Opinion, the subholding companies having been conceived and utilized solely as *pyramiding devices* in the Bond and Share system, 'thus stood squarely within the focus of the statutory intendment'." (R., Vol. II, 598).

One of the purposes of a holding company system is to "pyramid" to a greater or lesser extent, and holding company systems up to the third degree are recognized by the Act. The only case in which Congress proscribed holding company systems for "pyramiding" alone is the case of third-degree holding companies. Even there the remedy is

not dissolution. The Commission is merely told, in carrying out of the provisions of Section 11(b)(2) to "require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company."

Assuming all the Commission says as to complexity and unfair and inequitable distribution of voting power in the Bond and Share system to be true, Section 11(b)(2) still does not authorize the dissolution of Electric solely because it has a pyramiding effect in that system.

Earlier drafts of Section 11 required the Commission to do away with all holding companies who were not holding companies in the first degree holding a certificate of necessity from the Federal Power Commission. The section was the most bitterly contested provision of the entire Act, and as finally enacted, the section, as stated above, proscribes only holding companies to the third degree. With respect to all other holding companies and holding company systems, the Commission is to apply the requirements of Section 11 as a whole.

The Commission's argument that only dissolution accomplishes the purposes of Section 11 effectively and promptly is like urging that amputation at the neck would solve a multitude of human ills. The Commission's task is not so simple. Its duty is of a more expert, constructive and affirmative nature, namely, not only to bring existing holding company systems into geographical integration so far as possible, but also to simplify the corporate structure of existing holding company systems so far as possible. Again, the fallacy of the Commission's reasoning lies in its

refusal to recognize Electric's statutory rights. It is the corporate structure of Bond and Share which offends, and which can be cured simply by divorcing Bond and Share's control of Electric.

Lack of Factual Support for Dissolution Order.

The American brief makes a detailed analysis of factual data and we shall not, therefore, burden the Court with further analysis of that nature, beyond pointing out a few illustrations of the shocking extent to which the "facts" respecting Electric are misstated by the Commission's opinion.

In discussing distribution of voting power with respect to Electric (R. Vol. II, pp. 622-624), the Commission sets forth certain figures as to the investment by Electric in its subsidaries in terms of book value on the books of such subsidaries. On that basis Electric had an investment of 39.21% of the total capital, including debt securities and surplus, of its subsidiaries as a whole. The Commission's order obviously is not based upon this 39.21% figure, in view of the fact that the Commission considers 25% to 30% to represent an adequate investment to support controlling voting power. *Matter of Puget Sound Power & Light Company,* SEC Holding Company Act Release No. 4255, April 27, 1943; *Matter of Mississippi Power & Light Company and Electric Power & Light Corporation,* SEC Holding Company Act Release No. 5237, page 10, August 21, 1944.

The Commission, therefore, goes on to make certain adjustments for alleged "write-ups" and alleged insufficiency of depreciation and depletion, without making any findings regarding any of these matters. Such write-ups and such depreciation and depletion inadequacies are dealt with as pure assumptions and on an "if" basis, and on such

basis the Commission reduces Electric's investment in its subsidiaries, first to 32.72% and then to 15.65%.

The keystone of the Commission's opinion on this fundamental matter of distribution of voting power rests "on the basis of the foregoing figures" (R. Vol. II, p. 624). And yet the Commission's guesses, hypotheses and assumptions, which are the basis of "the foregoing figures," can be shown by the Commission's own decisions to be completely unrealistic.

For example, in Appendix F-2 to the Commission's opinion (R. Vol. II, p. 667), which sets forth in detail the manner in which "the foregoing figures" were arrived at, Electric's investment in Idaho Power Company, as "adjusted" by the Commission, is shown to be $5,603,794. Yet the Commission approved a series of transactions pursuant to which Idaho Power Company made all the adjustments on its books required by the Commission, the Federal Power Commission and the Oregon and Idaho state regulatory authorities, leaving in Electric's hands common stock of a par value of $9,000,000 and a book equity of $9,929,000 (SEC Holding Company Act Release No. 4494, p. 4, August 14, 1943), and subsequently approved the sale of such common stock to the public for $10,361,250 (SEC Holding Company Act Release Nos. 4458 and 4527, July 29 and August 31, 1943).

Similarly, in Appendix F-2 Electric's investment in United Gas Corporation, as "adjusted" by the Commission, is shown at only $60,460,109. Yet United Gas Corporation has been reorganized under Section 11 pursuant to an order of the Commission and in such reorganization Electric has been accorded new common stock having a par value of $101,081,010 (SEC Holding Company Act Release No. 5271, September 7, 1944).

Also, in Appendix F-2 Electric's investment in Mississippi Power & Light Company, as "adjusted" by the Commission, is shown at $114,999. Yet a series of transactions has since been consummated by Electric and Mississippi Power & Light Company under an order of the Commission pursuant to which all matters complained of in the accounts of Mississippi Power & Light Company have been eliminated or provided for (SEC Holding Company Act Release No. 4888, February 12, 1944) and Electric after such transactions held common stock of Mississippi Power & Light Company having a stated value of $2,500,000. A further transaction, including a capital contribution of $2,018,200 by Electric, raised the equity of Electric in Mississippi Power & Light Company to $5,069,500 (SEC Holding Company Act Release No. 5237, p. 13, August 21, 1944).

Again, in Appendix F-2 Electric's investment in Louisiana Power & Light Company, as "adjusted" by the Commission, is shown at $181,841. Here also a series of transactions by Electric and Louisiana Power & Light Company have resulted in conformity with the orders of regulatory authorities with respect to the accounts of this company (SEC Holding Company Act Release No. 4797, December 29, 1943), and Electric owns after such transactions common stock of Louisiana Power & Light Company having a stated value of $6,000,000, and an equity of $6,815,000 (SEC Holding Company Act Release No. 4977, p. 3, April 7, 1944).

The figures given are taken from column (13) in Appendix F-2. They happen to be figures which can be tested against definitive and officially reported action taken by

the Commission since it made the guesses represented by that column.*

A further illustration of the unrealistic approach of the Commission, underlying its "foregoing figures," is also afforded by Appendix F-2. After reducing Electric's investment in all its subsidiaries on the basis of fallacious "adjustments" illustrated above, the Commission says that Electric has a "negative investment" in Utah Power & Light Company represented by a red figure of $28,000,000. The Commission then deducted this "negative investment" in the Utah company from investments of Electric in its other subsidiaries. This is not an algebraically negative figure; at most it means that stock alleged to have been issued without consideration is worth nothing. And the status of Electric's investment in one subsidiary can have no possible effect upon the status of its investments in others.

Such are the "foregoing figures" upon which the Commission based its "finding" as to distribution of voting power. Such is the character of the assumptions, guesses and hypotheses forming the "factual" basis of the entire "Findings" and Opinion.

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*It is true that there is a difference in time between the figures shown in Appendix F-2 and the definitive determinations by the Commission with which we have compared those figures. Nevertheless, the time differential is insufficient to explain the startling difference between the so-called "findings" constituting the "foregoing figures" upon which the Commission bases its conclusion of inequitable distribution of voting power, and the subsequent definitive determinations.

Moreover, the Commission cannot explain away this wide discrepancy between the figures in Appendix F-2 and the subsequent definitive determinations by adverting to amounts in Account 100.5 (Plant Acquisition Adjustments) of the Uniform System of Accounts, which, in some cases, are currently being amortized; for the Commission's opinion expressly excludes Account 100.5 from its "foregoing figures" and the figures in Appendix F-2 (R., Vol. II, 623).

In only one of the situations referred to above has the Commission imposed a dividend restriction in order to build up the common stock equity. This is in the Mississippi Power & Light case and the amount required to be added to surplus through such dividend restriction was less than $1,000,000.

The Order Dissolving Electric is Arbitrary and Unreasonable.

Although the Findings and Opinion of the Commission consist almost entirely of a catalogue of accusations leveled against Bond and Share and arising out of the control of Electric by Bond and Share, the order of the Commission results in losses and penalties to Electric, its subsidiaries, their security holders and the consuming public. The infirmity of the Commission's order in this respect goes deeper than a mere question of the selection of an administrative remedy. This case presents the arbitrary imposition of a remedy upon the wrong person. The entire import of the Commission's opinion is focused on the evils growing out of control of Electric by Bond and Share. The whole argument revolves around the statutory offensiveness of that control. With the powers which the Commission claims to have, the severance of that control presented a simple, direct remedy which could have been readily applied. The drastic remedy of dissolving Electric, the investment medium of more than 24,000 members of the public, is entirely unsupported by any reasonable basis.

Even if there were no decision on the subject, common sense and the dictates of fairness and justice would require that there be some relationship between a situation to be remedied and the remedy selected, between the "guilty person" and the person penalized. This is particularly true where a court or administrative body has discretion as to these matters, as the Commission claims it has here. If someone must suffer by the application of the remedy, the sufferer should be the one who committed or controlled the acts regarded as wrongful. Clearly, according to the Commission, Bond and Share was that person. We ask again, therefore, the question which to us throws into sharp

relief the Commission's error and which to us is unanswerable: Why did not the Commission adopt the simple remedy of severing the Bond and Share control of Electric, instead of one so injurious to the investing and consuming public?

So far as the petitioner knows the drastic remedy of dissolution has never been applied where an alternative remedy less harmful to innocent persons is available. See *Standard Oil Co.* v. *United States*, 221 U. S. 1, 78, 81 (1911); *United States* v. *American Tobacco Co.*, 221 U. S. 106, 184-185, 187 (1911); *United States* v. *United States Steel Corporation*, 251 U. S. 417, 457 (1920).

With respect to the Commission's protestations that dissolution is a simple remedy for the complex problems with which it is faced, the decision of this Court in *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177 (1941) is a complete answer. There the Court had under review an order of the N. L. R. B. requiring an employer to make certain employees whole for loss of pay resulting from an unfair labor practice. The Board had refused to go into the question of whether damages might have been mitigated by the individual employees through other employment and defended this approach on the ground of simplicity. In deciding against the Board on this point, the Court stated:

> "But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment." (p. 198)

Indeed the Commission's only justification for the order of dissolution is that, while it admitted that other remedies were available, in its judgment the present order was capable of prompt execution and avoided further hearings

and administrative difficulties (R., Vol. II, pp. 636, 640, 646-647). The above authorities sufficiently answer this argument of convenience.

We submit that on the basis of the principles enunciated in the foregoing cases alone, and even if there were no other infirmities in the Commission's order, it should be nullified and set aside.

CONCLUSION

The order of the United States Circuit Court of Appeals for the First Circuit should be reversed with directions that the order of the Securities and Exchange Commission issued August 22, 1942, be set aside.

Respectfully submitted,

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